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C O N F I D E N T I A L SECTION 01 OF 03 KYIV 000191

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TAGS: [PGOV](#) [PREL](#) [UP](#)

SUBJECT: POTENTIAL FOR POST ELECTION COURT BATTLES

REF: KYIV 000064

Classified By: DCM James D. Pettit for reasons 1.4 (b,d)

SUMMARY

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11. (C) Prime Minister Tymoshenko's continued allegation of fraud in the January 17 first round presidential election, despite the OSCE's assessment that it was, for the most part, free and fair, raises the importance of the appeals process for the February 7 runoff. The Chairmanship of the High Administrative Court (HAC), the arbiter of election cases, remains unclear. Both the former Chairman, believed aligned with Yanukovych's Party of Regions, and the Deputy Chairman, believed aligned with the Tymoshenko bloc, claim to be Acting Chairman. The (pro-Tymoshenko) Deputy Minister of Justice has told us (and said publicly) that the former Chairman's effort to remain in his post constitutes "the main threat to democratic and honest elections." The turmoil in the HAC provides an opportunity for the candidates to move their appeals outside of the Administrative Court system to courts considered amenable to their interests: the Constitutional Court, believed favorably disposed to Regions, or the Supreme Court, whose Chairman is a former member of Tymoshenko's parliamentary faction. The closer the result on February 7, the greater the chance for protracted legal challenges -- and a possible delay in the inauguration of the next president. Conversely, a clear win by front-runner Yanukovych (more than five percent) would likely leave little avenue for court challenges. End Summary.

PM CLAIMS FRAUD IN FIRST ROUND, WOULD APPEAL IN RUNOFF

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12. (U) Prime Minister Tymoshenko in a press interview on January 26 reiterated her claim that opposition leader Viktor Yanukovych's supporters were involved in electoral fraud. Her campaign has claimed since January 17 that three percent of Yanukovych's total belonged to her. They have offered no proof, however. Tymoshenko said that she chose not to appeal the results in order to avoid delaying the February 7 runoff, but promised to appeal to the courts if fraud occurs in the second round. Tymoshenko and MPs from her parliamentary bloc continue to claim that Yanukovych is planning similar manipulation in the runoff vote.

13. (C) In contrast to Tymoshenko's claim of election fraud, OSCE ODIHR election monitoring mission head, Ambassador Heidi Tagliavini, told the Ambassador on January 29 that the election was "very good" and estimated that 95 to 98 percent of election commissions followed all election day procedures correctly. Ambassador Tagliavini explained that Tymoshenko's continued insistence that large-scale fraud had occurred in the first round was "disturbing" and that a drawn out legal fight after the runoff election could further destabilize Ukraine's political system.

14. (U) The leadership dispute (reftel) between former Chairman Pasenyuk and the Deputy Chairman Sirosh in the High Administrative Court (HAC), the final arbiter of election cases, remains unresolved. The Rada has so far failed to pass the needed legislation to set up a new procedure to nominate and approve a HAC Chairman. The Chairman of the Supreme Court Vasyl Onopenko, who is close to PM Tymoshenko, on January 14 held a press conference where he stated that no HAC decisions signed by Pasenyuk should be recognized as legal. He said that he recognized Sirosh as Acting Chairman of the HAC until a new Chairman is "legally" appointed. However, in a blow to Sirosh, the Ministry of Internal Affairs (MOI) on January 16 confiscated the replacement of the HAC's official stamp that it had issued him the previous week after he reported the stamp was lost. In a public statement the MOI said that it confiscated the stamp because it determined that the original was not lost, but in the possession of Pasenyuk.

15. (C) The Prosecutor General's office on January 16 issued a legal opinion backing Pasenyuk as Acting Chairman until his replacement is named. The Prosecutor General said that because no one has the legal authority to replace Pasenyuk, his term should indefinitely continue. The Prosecutor General's office has no formal role in the HAC leadership dispute, but Prosecutor General Medvedko is aligned with Yanukovych. The OSCE ODIHR legal advisor told us that the observation mission had issued its own legal opinion that recognizes Sirosh as the HAC Acting Chairman. He explained

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that Pasenyuk's term as chairman had expired therefore the Deputy should fill in until a new Chairman is appointed.

REGIONS ADVISORS MINIMIZE HAC LEADERSHIP ISSUE

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16. (C) In a meeting with the Ambassador on January 28, senior Yanukovych campaign advisors claimed that the competing HAC chairmen would not pose a problem. They explained that election cases would be heard by all 55 HAC judges, thus minimizing the role of the Chairman. The Tymoshenko campaign's use of this issue was an attempt to discredit the election result and undermine the expected Yanukovych victory. The advisors told the Ambassador that Yanukovych's legal team is fully prepared to defend the election results in the courts.

DEPUTY JUSTICE MINISTER: "THREAT TO DEMOCRACY"

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17. (C) Deputy Justice Minister Yevhen Korniychuk told us January 27 that dueling HAC Chairmen constituted "the main threat for democratic and honest elections." He repeated it publicly. Pasenyuk's insistence on staying in his position was completely political in motivation; he seeks to serve Party of Regions interests, Korniychuk said. The integrity of the election could, he insisted, be at stake. Korniychuk told us he was in touch with Supreme Court Chairman Onopenko to find a way out of the problem by election day, but did not expect to be successful.

WILL SYSTEM PREVENT MANIPULATION?

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18. (C) Olga Shumylo, Director of the International Center for Policy Studies, explained to us that the procedures of the HAC could help mitigate any attempts to manipulate election cases. She said that prior to the end of his term in December, Pasenyuk had issued a ruling that all election

cases would be heard by the entire HAC plenary of 55 judges. This would prevent the chairman or politically like-minded judges from handing the election to their favored candidate. Shumylo told us that the reporting judge in each case would be randomly assigned by computer. HAC Deputy Chief Judge Mihailo Tsurkan confirmed to us that random case assignment is in effect in the HAC and that the assignment process would be transparent. He also explained that even if Pasenyuk rescinded his order that the full HAC plenary must hear election cases, appeals would be heard by five-judge panels assigned by the head of the second HAC chamber, which deals with election issues, not by Pasenyuk.

#### COURT APPEALS AND A LOOPHOLE

¶9. (C) The dispute over the HAC Chairmanship opens a significant loophole for the presidential candidates to appeal their court cases outside the Administrative Court system, according to Shumylo. Although the Law on Presidential Elections says that the HAC decisions can not be appealed, the procedures that the HAC uses to hear the case or the role played by the Acting Chairman could be appealed to the Supreme Court or the Constitutional Court. Shumylo said that a candidate could use this avenue to have an unfavorable HAC decision thrown out.

¶10. (C) BYUT MP (and member of Tymoshenko's legal team) Valeriy Pysarenko told us that while this move is possible, it would take "significant legal maneuvering." He said that Tymoshenko will not appeal election results if the margin is more than five percent because "it just would not make sense" but that if the outcome is close they are ready to take the fight to the courts.

#### COMMENT

¶11. (C) Pysarenko's view is shared by many here: the closer the result, the greater the chance for protracted court battles and a potential delay in the inauguration of the next president. Ukraine's nebulous legal framework leaves ample room for challenge in the event of a close result. Both sides are gearing up for a fight should that be the case. If, however, Yanukovych were to win convincingly, by over five percent (some put the bar lower), that momentum -- absent credible reports of significant fraud by impartial observers -- would blunt the effect of the Tymoshenko

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campaign's court challenges.  
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